80-446

No. .....

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1980

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UNION PACIFIC RAILROAD COMPANY,

Petitioner,

vs.

DONALD D. FLETCHER,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

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QUESTION PRESENTED FOR REVIEW

May a railroad employee maintain an action under the Federal Employers' Liability Act for personal injuries arising from allegedly negligent assignment to overly strenuous work if the suit is filed more than three years after the employee has ceased performing such work and more than three years after the employee learned of the cause of his injuries?

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Petitioner Union Pacific Railroad Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in favor of the respondent in the above-entitled case on May 7, 1980, rehearing denied June 26, 1980.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 621 F. 2d 902, and is printed in Appendix A. The opinion of the District Court has not been reported and is printed in Appendix B.

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JURISDICTION

The opinion of the Court of Appeals was filed and a judgment in accordance therewith, printed in Appendix C, was entered on May 7, 1980. An order denying a rehearing was entered on June 26, 1980 and is printed in Appendix F. The jurisdiction of this court is involved under Title 28 United States Code, Section 1254 (1). On July 25, 1980 the Court of Appeals stayed the issuance of its mandate and granted an extension of time to file this Petition of Certiorari until September 24, 1980, which order is printed in Appendix G.

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STATUTES INVOLVED

This case involves a question as to the proper application of the Statute of Limitations provision of the Federal Employers' Liability Act, 45 U. S. C. Sec. 51 *et seq.* (hereinafter referred to as "the FELA" or "the Act"). The provisions of the Act involved here are contained in

Sections 51 and 56 which read, in pertinent part, as follows:

> Section 51. "Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . ."
>
> Section 56. "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

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STATEMENT OF THE CASE

Donald Fletcher, Respondent here, is an employee of Petitioner Union Pacific Railroad Company (hereinafter referred to as "Union Pacific" or "the Railroad"). On March 21, 1962 he experienced a traumatic, work-related back injury for which he was treated but for which he filed no claim against Union Pacific. Over the years Fletcher was treated for back pain while still working as a sectionman for the Railroad. On December 7, 1973 he took a leave of absence from that position and has never re-

turned to work as a sectionman. Fletcher remained on the employee roster as a sectionman while on his leave of absence. (In 1975, Fletcher returned to work for the Railroad as a crossing watchman/flagman. His work as a crossing watchman has never been alleged to have been negligently assigned and is not involved in this case.)

Fletcher brought suit against the Railroad in the United States District Court for the District of Nebraska on June 8, 1977, under the provisions of the Federal Employers' Liability Act, 45 U. S. C. Sec. 51 et seq., alleging that the doctors who had treated him were agents of Union Pacific and had misdiagnosed the nature of his back problem until July, 1974. Jurisdiction in the District Court was based on 45 U. S. C. Sec. 56. In addition, he alleged that prior to December 7, 1973 the Railroad had ordered him to perform overly strenuous work as a sectionman when it knew or should have known that such work would aggravate his back problem.

The District Court, sitting without a jury, found that the doctors were not Railroad agents and that no misdiagnosis had taken place. Further, the Court found that Fletcher knew he was injured, knew the causes of his injuries, knew his injuries impaired his working ability, and had these facts confirmed as late as July, 1973 and February, 1974, more than three years before suit was filed. Accordingly, the Court entered an order, printed in Appendix D, dismissing the Respondent's complaint on the grounds that it was filed more than three years after any cause of action accrued. Respondent moved to alter judgment or in the alternative for a new trial. The Court entered an order, printed in Appendix E, overruling this motion.

Fletcher appealed the decision to the Court of Appeals for the Eighth Circuit. On May 7, 1980, that court unanimously upheld the District Court's finding that no misdiagnosis had taken place, which disposed of Fletcher's first allegation without requiring a ruling on the issue of the treating physician's relationship to the Railroad. The Court of Appeals reversed, with one judge dissenting, on the issue of the negligent assignment, holding that the statute of limitations was tolled so long as Fletcher was maintained on the employee roster as a sectionman although he was no longer engaged in such work. The Court ordered the matter remanded to the District Court for further proceedings. The Railroad's Petition for Rehearing was denied on June 26, 1980 by a five to three vote of the Court of Appeals.

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REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with applicable decisions of this Court and other courts of appeals to the effect that a suit alleging negligent assignment to strenuous work must be brought within three years from the time the employee ceases such work.

The central issue before this Court is the accrual of Fletcher's cause of action for the alleged negligent assignment to overly strenuous work as a sectionman. In this regard, two dates are of critical importance: December 7, 1973, the last date on which Fletcher performed work as a sectionman, and June 8, 1977, the date his suit

against the Railroad was filed. This period of time was three and one-half years long. After December 7, 1973, Fletcher no longer performed any of the work of which he complains in his suit. In 1975, he took a position as a crossing watchman for the Railroad. His work at that job is not involved in this case.

In its opinion the Court of Appeals relied heavily on the decision in *Fowkes v. Pennsylvania R. R. Co.*, 264 F. 2d 397 (3rd Cir. 1959). An examination of this case shows that it is actually in direct conflict with the conclusion of the Court of Appeals and supports Union Pacific's position.

The plaintiff in *Fowkes* brought a FELA action against the defendant railroad on August 31, 1955 alleging that traumatic arthritis has resulted from a series of jolting impacts caused by a defect in an air hammer which the plaintiff had used from 1924 until September 9, 1952. The plaintiff complained to his superiors about the air hammer over the years but he continued to use it until September 9, 1952 when he took another position using a smaller air hammer when the larger one became too difficult to handle.

The trial court found that the suit had been brought within the Statute of Limitations period, reasoning that the statute was tolled until the plaintiff was aware that an arthritis condition had developed in his back. The Court's reasoning was grounded on *Urie v. Thompson*, 337 U. S. 163 (1949), which involved industrial disease. The Court of Appeals, however, found it unnecessary to involve the doctrine of *Urie v. Thompson*. Instead, the Court of Appeals noted that the plaintiff's injuries were

the result of the cumulative effects of his work over the years and accordingly, held that suit need be filed within three years of his last day of participating in such work. Thus, *Fowkes* stands for the proposition that the statute of limitations under the FELA begins to run when the injury producing conduct on the part of the employer ceases.

The *Fowkes* decision indicated that there was a causation question which might have involved the *Urie v. Thompson* doctrine that a cause of action for industrial disease does not accrue until the employee knows or should have known he was afflicted and that his employment caused his injury. However, as noted, the Court ultimately held that a resolution of that issue was not necessary to decide the case. Moreover, that issue is not involved here as the Court of Appeals, in the decision below, clearly held that there had been no misdiagnosis and, further, that Fletcher was thus aware of the injury and its causation more than three years before suit was brought (App. p. 9).

The holding in the *Fowkes* case has been fundamentally misconstrued by the Court of Appeals:

On page 11 of its opinion, the Court says:

> "*Fowkes v. Pennsylvania Railroad* stated that the statute does not begin to run on the injury until the master-servant relationship ends." (App. p. 12.)

This is, however, incorrect. As noted, the focus of *Fowkes*, and of all other FELA cases concerning the statute of limitations which can be located, *is not on the master-servant relationship but rather is on the injury producing conduct. Fowkes* held that the statute did not begin to run until the plaintiff was relieved of the injury producing

type of work he was doing. In fact, in *Fowkes,* as in this case, the master-servant relationship did not end when the injury producing conduct did. There, as in the case at bar, the plaintiff continued to work for the defendant railroad but in a different job. In the present case, Fletcher did not terminate his relationship with the Railroad but took a leave of absence and later returned to work as a flagman.

From the foregoing it is clear that there are many similarities between the facts in *Fowkes* and the facts in the instant case. However, the cases are strikingly dissimilar with regard to the most crucial fact in both cases: In *Fowkes* the plaintiff brought suit within three years of the time he ceased to perform the injury producing work; however, in the instant case Fletcher did not bring suit within three years of the time he ceased to perform the injury producing work. Put more simply, Fowkes brought suit before the statute of limitations had run but Fletcher did not bring suit before the statute of limitations had run.

The Court of Appeals on page 11 of its opinion also states that:

> "The salient factor is how long the Railroad persisted in its allegedly tortious conduct." (App. p. 12.)

Apparentiy, the Court of Appeals believed that leaving Fletcher on the roster as a sectionman was tortious and, therefore, the salient factor. In fact, the salient factor is when the Railroad last caused injury. It is unquestioned that Union Pacific did not place Fletcher in an injury producing environment after December 7, 1973. However, the Court has adopted the fiction that the mere fact that Fletch-

er continued with the *title* of sectionman after December 7, 1973 (but performed no injury producing work after that date) was sufficient to cause the injury producing conduct to continue.

The Court of Appeals maintains that certain physicians' reports in July, 1974 and April, 1975 referring to Fletcher as a "sectionman" serve to show that the Railroad negligently assigned work to Fletcher (App. pp. 12-13). Here, again, the decision makes little sense. The reports concern Fletcher's condition; they are not orders from the Railroad to return to work which he followed. Manifestly, he did not return to strenuous work after December 7, 1973 and the mere fact that he was referred to as a "sectionman" in certain medical reports is clearly irrelevant. (As previously noted, Fletcher took a job with the Railroad as a crossing watchman in 1975. No complaint of negligence is involved with that work.)

The cases are replete with support for the Railroad's position in this case. The Court of Appeals itself on page 10 of its opinion says:

> "An employee's right of action against his employer for personal injuries may be tolled until the last day the employee was subjected to the conditions causing the injury." *Simmons v. American Mutual Liability Insurance Company,* 433 F. Supp. 747, 751 (S. D. Ala. 1976) aff'd without opinion, 560 F. 2d 1022 (5th Cir. 1977). (App. p. 11).

The *Simmons'* case dealt with silicosis, an industrial disease considered under Alabama law to be a continuing injury. There the Court said:

> "The time of injury is determined by the last date of exposure. The last date of exposure is the last date

> of employment in the type of work causing the injury, *Minyard v. Woodward Iron Company,* 81 F. Supp. 414 (N. D. Ala. 1948), affirmed 170 F. 2d 508. Here it would be the last date of exposure while using the articles in question." 433 F. Supp. at 751.

Thus, even the cases which the Court of Appeals relied on for its opinion actually support Union Pacific's contention. The Court of Appeals erred in not following the cases which it cited.

The First Circuit also had occasion to rule on the application of the statute of limitations in a FELA case somewhat similar to the present action. In *Brassard v. Boston and Maine Railroad,* 240 F. 2d 138 (1st Cir. 1957), the plaintiff alleged that he had been required to do heavy lifting without proper equipment or help, causing injuries to his back. The Court of Appeals, in reviewing the District Court's dismissal of the amended complaint, treated the complaint as alleging separate and distinct torts over a period of time and said:

> "The familiar rule is that if defendant commits a single breach of duty, plaintiff's cause of action in tort ordinarily accrues at the time his interest is invaded. Restatement, Torts, § 899 comment c. If, however, defendant commits successive breaches of duty toward plaintiff, and these cause separate invasions of plaintiff's interest, each new invasion is a new tort. (citations omitted). It is the second branch of this rule that applies to the amended complaint at bar as we construe it. Hence it follows that if plaintiff can prove his allegation that defendant committed a new breach in October 1953, and that this breach caused a new invasion of plaintiff's interest, he has a valid cause of action which arose within three years." 240 F. 2d at 141.

In the present case, essentially Fletcher is alleging successive breaches of Union Pacific's duty to him. In no instance, however, did a breach occur after December 7, 1973, and, therefore, his cause of action accrued at the very latest at that time.

This court recognized the traditional purposes of the statutes of limitations in the *Urie v. Thompson, supra,* decision. There it was said these purposes "... conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights." 337 U. S. at 170. In this case the facts are that Fletcher had notice that continuing heavy work was causing harm and he not only failed to assert his claim for more than three years after receiving such notice, but also failed to assert his claim for more than three years after ceasing to perform such work.

2. The decision below represents such a departure from accepted negligence law as to call for the exercise of this Court's power of supervision.

The decision of the Court of Appeals is not only in conflict with the decisions of other Courts of Appeals, as established, *supra,* but it is in conflict with recognized authorities on the question accrual of a cause of action in tort.

The nexus of a cause of action in tort is injury. Prosser states:

> "Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered." Prosser *Torts 4th Edition,* pp. 143-144.

Further, Prosser says:

> "It follows that the statute of limitations does not begin to run against the negligent action until some damage has occurred." Prosser, p. 144.

The legal encyclopedias are in accord on this point. C. J. S. states:

> "Subject to rules governing single or successive suits, it may be broadly stated that, where a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury, or when the tortious overt acts cease." 54 C. J. S. Limitations of Actions, Sec. 169.

In the present case, the last possible date of injury and the last possible date of allegedly tortious acts by the Railroad is December 7, 1973.

To the same effect is Am. Jur. 2d:

> "As a general rule, the occurrence of an act or omission, whether it is a breach of contract or of duty, whereby one sustains a direct injury, however slight, starts the statute of limitations running against the right to maintain an action."
>
> 51 Am. Jur. 2d Limitation of Actions, Sec. 109.

No personal injury cases have been found which extend the accrual of a cause of action beyond the last date of injury when the injured party is aware of the cause of his injuries. The findings of the District Court and the Court of Appeals in this case are clear that Fletcher was aware of his problems before he took his leave of absence on December 7, 1973, after which date he performed no strenuous work (App. pp. 9 and 23).

The statute of limitations is an important element in the FELA and its provisions are deserving of respect.

However, it appears that the Court of Appeals simply did not like the result reached by the applying of the statute of limitations in this case and "stretched" to find a reason to reverse the District Court to allow Fletcher another opportunity to try his case.

By focusing on the relationship of the parties, rather than on the injury producing conduct, the Court of Appeals simply defies logic. A look at other results if this approach is followed by the courts should be instructive. Consider the result if, instead of granting Fletcher's request for a leave of absence on December 7, 1973, the Railroad had fired him. According to the Court of Appeals, only under such circumstances would Fletcher's cause of action have accrued at that time because the master-servant relationship would have ended. Accordingly, the Railroad would be more prudent to fire employees in order to begin the running of the statute. Such a result is hardly in keeping with the FELA but makes perfect sense under the Court of Appeals ruling.

If one were to use the logic of the Court of Appeals on the issue of negligent assignment and apply it to an ordinary automobile accident case, the absurdity would be magnified. For example, if a motorist negligently struck a pedestrian on December 7, 1973, and thereafter continued to drive negligently but never struck the pedestrian again, the Eighth Circuit's logic would hold that the pedestrian's cause of action for the December 7, 1973 accident did not accrue until the motorist ceased driving negligently, although no further harm resulted to the pedestrian.

If the statute of limitations does not apply in this case, where the respondent knew of his injuries and knew that

the alleged negligent assignment to strenuous work was a cause, where does the statute apply? The Court of Appeals effectively says that it does not ever apply so long as the employment relationship continues to exist.

The importance of the statute of limitations question involved in this case cannot be over emphasized. If the decision of the Court of Appeals is not reversed, confusion will reign in this area and the intent of Congress will be emasculated.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1472

DONALD D. FLETCHER,

Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Appellee.

Appeal from the United States District Court
for the District of Nebraska

Submitted: December 7, 1979
Filed: May 7, 1980

Before GIBSON, Chief Judge,* HENLEY and McMILLIAN, Circuit Judges.

McMILLIAN, Circuit Judge.

Donald Fletcher appeals the judgment of the district court[1] that his personal injury claim against Union Pacific

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*The Honorable Floyd R. Gibson was Chief Judge of the Eighth Circuit at the time this case was submitted and took senior status on December 31, 1979, before the opinion was filed.

1 The Honorable Albert G. Schatz, United States District Judge for the District of Nebraska.

Railroad Company (the Railroad), under the Federal Employers Liability Act (FELA), 45 U. S. C. § 51 *et seq.*, was barred by the FELA three-year statute of limitations. For the reasons discussed below, we reverse in part and remand to the district court.

Fletcher was employed by the Railroad as a sectionhand doing heavy labor. On March 22, 1962, Fletcher shoveled crushed rock for approximately forty-five minutes, under instructions to work as fast as he could. When the job was finished, he started to lay a shovel on the bed of the truck. He felt a sharp pain in his lower back and had to catch the edge of the truck to keep from falling. The foreman had Fletcher taken to the Union Pacific Railroad Employees Health Association (UPREHA)[2] Dispensary (the Dispensary). There he was examined by a physician, his back was taped, and he was given some pain pills and instructed to return in a week, which he did. For the next two months, Fletcher reported to work but was unable to carry on the activities of a sectionhand and was instructed to keep time records. Thereafter he was permitted to return to work.

It is undisputed that, since the injury on March 21, 1962, Fletcher has had a chronic back problem and has re-

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2 UPREHA is a health care group formed by the Railroad employees. The Railroad sends employees who are sick or injured on the job to the Dispensary for medical treatment. The Dispensary is located in the Railroad's headquarters in Omaha, Nebraska, in office space that it leases from the Railroad. UPREHA also maintains a ward at St. Joseph Hospital and refers employees to outside specialists for treatment of problems within their medical specialities. As a condition of employment, each employee is required to sign an authorization granting the Railroad Claim Department access to all medical records.

ceived extensive hospitalization and treatment. However, there is complete disagreement between the parties over whether and in what circumstances Fletcher reported to the Dispensary from 1962 to 1966. He says that he went frequently and was told that nothing was wrong with his back. The Railroad says that he did not see any physicians at all until he returned to the Dispensary of his own accord in 1966.

In any event, on February 24, 1966, Fletcher was referred to an orthopedic surgeon at the UPREHA ward for lower back pain. This doctor admitted Fletcher to St. Joseph Hospital (the Hospital) and diagnosed "lumbar disc syndrome." Fletcher's symptoms were treated conservatively, that is, with traction, bed rest and pain medicine. Upon his discharge from the Hospital, Fletcher was assigned to the same heavy work as a sectionhand that he had been doing when he injured his back on March 21, 1962. This pattern was to continue for the next several years, with at least four hospital stays and diagnoses ranging from "atypical disc syndrome" to "dorsal lumbar arthritis."[3]

On June 18, 1973, Fletcher was readmitted to the Hospital by Dr. Bernard Kratochvil of the UPREHA ward who repeated a myelogram. The myelogram was within normal limits, and the diagnosis was "lumbar disc syndrome." However, for the first time, Fletcher was not released to work as a sectionhand. Dr. Kratochvil wrote a letter to the Railroad superintendent which said, "Be-

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3 On two occasions, Fletcher was also treated for depression as the pain got worse and more constant.

cause of his back condition I recommend Mr. Donald Fletcher be given less strenuous work." The letter, on UPREHA stationery, was dated July 11, 1973. Dr. Kratochvil's written recommendation was not followed by the Railroad. Fletcher was put back on as a sectionhand and remained on the job until he could not stand the pain any longer.

On December 7, 1973, Fletcher went on leave-of-absence status. He was then referred by the UPREHA district surgeon to a neurologist, who diagnosed "a chronic degenerative lumbar intervertebral disc or chronic lumbar strain."

In June 1974, the Railroad sent Fletcher to be evaluated for disability. Based solely on X-rays, these doctors decided that Fletcher was physically sound and rejected him for disability or retirement. Their report was made in early July 1974.

Coincidentally, in July 1974, Dr. Kratochvil told Fletcher he needed a fusion operation[4] for his "unstable back." Dr. Kratochvil testified that Fletcher's pain was precipitated by movement and that the purpose of the fusion operation was to decrease movement in the back and thus decrease the pain.

On March 4, 1975, Fletcher notified the Railroad that he was making a claim for his back injury and the claims agent took his statement. On March 15, 1975, the Railroad

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4 In a fusion operation the fourth and fifth lumbar vertebra are fused to the sacrum by means of a transverse fusion process in which a section of bone is removed from the hip and fused to the body of the vertebra.

claims agent requested that Dr. Kratochvil send him all of Fletcher's medical records. Dr. Kratochvil's March 19, 1975, letter to the claims agent stated:

> Mr. Donald Fletcher has continued under outpatient treatment following his back surgery in July, 1974. He will not be able to return to work for another thirty days because of the fact that he has had a back fusion. I would not recommend that he continue to do any work that requires heavy bending and lifting.

In an April 16, 1975, letter to the claims agent, with a copy to the Roadmaster, Dr. Kratochvil wrote, "I will not be able to release him to return to his present job as sectionman. We would like to get him back to work as soon as another type of work is available." On July 23, 1975, Dr. Kratochvil wrote of Fletcher, "He is being released today for temporary work as a Crossing Watchman." Since that date, Fletcher has worked occasional Sundays as a flagman and receives a $25-per-day disability supplement for days he does not work.[5]

This suit was commenced on June 8, 1977. In a June 22, 1977, letter to the claims agent, Dr. Kratochvil said that "the lumbar strain was the result of years of heavy work." He set Fletcher's disability at 20%.

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5 On June 23, 1977, the Railroad estimated Fletcher's approximate wage loss from 1973 through 1977 as follows (ex. 16):

1973 -	$ 739.00
1974 -	9,563.04
1975 -	10,523.52
1976 -	11,630.16
1977 -	13,008.24
Total -	$45,463.96

Fletcher brought this action pursuant to the FELA to recover for a work-connected back injury. After a bench trial, the court granted the Railroad's motion to dismiss on the ground that Fletcher's claim was time barred by the FELA three-year statute of limitations. The court assumed that Fletcher's cause of action accrued on March 21, 1962, and rejected Fletcher's contention that the Railroad was equitably estopped from asserting the statute of limitations. In so deciding, the court held: (1) the doctors who treated Fletcher were not agents of the Railroad, (2) their diagnoses of Fletcher's condition were neither misrepresentations nor misdiagnoses, and (3) Fletcher was not misled as to the nature of his injury or his ability to work. The court did not reach Fletcher's allegation that the Railroad negligently assigned him to work which was not within his physical capacity to perform with reasonable safety.

On appeal, Fletcher first contends that the court erred in holding that the Railroad was not estopped from asserting the statute of limitations. Fletcher claims that, because of the various and erroneous diagnoses of the UPREHA doctors, he was induced to delay taking appropriate legal action until after expiration of the statute. Therefore, by his analysis, the claim accrued only when he received the correct diagnosis and underwent surgery in 1974. The Railroad counters that, under the FELA, an employee's claim for a traumatic injury accrues at the time of the accident. The Railroad also denies that the doctors were its agents. Furthermore, the Railroad argues that, even if the statute were tolled by Fletcher's initial treatment at the Dispensary in 1962, the statute would

have expired before Fletcher returned to UPREHA physicians in 1966.

The FELA provides that actions for injuries to employees must be brought "within three years from the day the cause of action accrued." 45 U. S. C. § 56. In cases involving traumatic injury, when the symptoms are immediately manifested so that the employee is aware of the event causing the injury, the cause of action accrues upon the occurrence of the injury, regardless of whether the full extent of the disability is known at that time. *Brassard v. Boston & Main R. R.*, 240 F. 2d 138 (1st Cir. 1957); *Deer v. New York Central Ry.*, 202 F. 2d 625 (7th Cir. 1953); *Felix v. Burlington Northern, Inc.*, 355 F. Supp. 1107 (D. Minn. 1973). By the same token, with industrial diseases, where the symptoms are not immediately manifested, the cause of action does not accrue until the employee is aware or should be aware of his condition. *Urie v. Thompson*, 337 U. S. 163 (1949); *Young v. Clinchfield R. R.*, 288 F. 2d 499 (4th Cir. 1961). However, even in cases of traumatic injury, the statute of limitations is not inflexible but may be extended beyond three years for equitable reasons. *Glus v. Brooklyn Eastern District Terminal*, 359 U. S. 231 (1959). A railroad is equitably estopped from asserting the statute of limitations as a defense if misrepresentations by either it or its agent caused the employee's failure to bring his action within the three-year period. *Fravel v. Pennsylvania R. R.*, 104 F. Supp. 84 (D. Md. 1952) (fraud re diagnosis and legal rights). The railroad is equitably estopped even if the misrepresentations upon which the employee relied were unintentional. *Louisville & Nashville R. R. v. Disspain*, 275 F. 2d 25 (6th Cir. 1960) (misdiagnosis); *Mumpower v. Southern Ry.*,

270 F. Supp. 318 (W. D. Va. 1967) (misdiagnosis); *Tillery v. Southern Ry.*, 348 F. Supp. 9 (E. D. Tenn. 1971) (legal advice). But the railroad's misrepresentations will not estop it from asserting the statute of limitations where a substantial period of time supervened after expiration of the delay caused by the railroad. *Holifield v. Cities Service Tanker Corp.*, 421 F. Supp. 131 (E. D. La. 1976) (delay even after surgery to correct the injury); 53 C. J. S. Limitations of Actions § 25. Likewise, a railroad is not estopped where the employee did not in fact rely on its misrepresentation. *Holifield v. Cities Service Tanker Corp., supra,* 421 F. Supp. at 135. Apart from the estoppel cases, the statute of limitations may be tolled by extenuating circumstances, especially where there is no prejudice to the railroad. *Burnett v. New York Central R. R.*, 380 U. S. 424 (1965) (allowed to refile in proper forum); *Billings v. Chicago, Rock Island & Pacific R. R.*, 581 F. 2d 707 (8th Cir. 1978) (improper venue).

We agree with the district court that Fletcher's claim for the back injury is barred by the statute of limitations. Because it is not necessary to our conclusion, we do not reach the issue of whether the many doctors who treated Fletcher after 1962 were agents of the Railroad.[6] However, we note that the trend is toward finding agency in such cases and that the record before us does not include many of the determinative facts, such as: whether medical care is provided pursuant to a contract or statute; who pays the physicians or contributes to the fund for com-

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6 The Railroad conceded, in it brief as well as at oral argument, that the UPREHA doctors at the Dispensary were its agents at least as to the initial visit.

pensating the physicians; who administers the fund and how; who selects the physicians; who sets the standards for employment and disability physicals; whether injured employees are required to report to the company physician; what non-monetary advantages accrue to the railroad; and what is the custom and practice. *See* Annot., 16 A. L. R. 2d 564 (1966).

There is no equitable estoppel here simply because there was no misrepresentation within three years of filing suit. Giving Fletcher the benefit of every doubt, we might assume that he received a misdiagnosis at the Dispensary in March of 1962, which kept him unaware of his condition. However, the back problem was definitely diagnosed no later than February of 1966. From then on, all the medical terms applied to Fletcher's back—from "lumbar disc syndrome" to "unstable back"—refer to chronic back strain. The 1974 surgery was not delayed by misdiagnosis, but was performed as soon as his degenerative condition had progressed to the point where surgery was indicated.

Moreover, Fletcher was not misled by the difference in medical terminology. His attorney conceded, "Mr. Fletcher has never claimed that he was told that nothing was wrong with his back or that a slumbering symptom suddenly erupted and disabled him." Brief of Appellant at 22. This admission also undermines Fletcher's alternative theory that his condition was analogous to an industrial disease. We agree in theory that a traumatic injury could produce latent symptoms such that tolling the statute of limitations until the employee knew he was injured would be appropriate. *See Paynter v. Chesapeake & Ohio Ry.*, 60 F. R. D. 153, 157 (W. D. Va. 1973). However, the

situation at bar does not present such a case. As soon as Fletcher became aware that something was wrong with his back,[7] his lack of reliance on the doctors' representations obviated equitable estoppel. Therefore, Fletcher's cause of action for his March 21, 1962, injury is barred by the statute of limitations.

Fletcher's second contention is that the Railroad is liable for negligently assigning him to work more strenuous than that for which he was reasonably suited. The Railroad argues that this cause of action accrued when he quit working in December 1973 and therefore is also barred by the statute of limitations. The threshold question is whether the statute had run on the negligent assignment claim.

The statute of limitations for the negligent assignment claim is distinguished from the claim for the original injury. Where injury results from a negligent act and the injury continues by reason of continued negligence, a recovery may be had for damages[8] caused by the continuing negligence although a cause of action based on the original negligent act is barred. 54 C. J. S. Limitations of Actions § 174a. Therefore, although the cause of action for the original injury was barred by limitations, the statute of

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7 If his back bothered him constantly from March 21, 1962, his cause of action accrued on that date. Even if his cause of action had not accrued until February 1966, more than three years supervened after the delay allegedly caused by the Railroad.

8 Some courts hold that, in order to toll the statute, the damages must be separate and distinct injuries. 54 C. J. S. Limitations of Actions § 174a.

limitations for the negligent assignment claim did not begin to run until its own time of accrual.

Where an injury is caused by continuing or repeated acts, the statute of limitations may not begin to run even when the tort is complete. *Steubig v. Hammel,* 446 F. Supp. 31, 35 (M. D. Pa. 1977); *Lathon v. Parish of Jefferson,* 358 F. Supp. 558, 559 (E. D. La. 1973); 4 Restatement of Torts 2d § 899c. The statute of limitations may be tolled until the tortious conduct ceases, on the theory that one should not be allowed to acquire a right to continue the tortious conduct. *Donaldson v. O'Connor,* 493 F. 2d 507, 529 (5th Cir. 1974), *vacated on other grounds,* 422 U. S. 563, *on remand,* 519 F. 2d 59 (1975); *Harper v. Union Savings Ass'n,* 429 F. Supp. 1254, 1260 (N. D. Ohio 1977). An employee's right of action against his employer for personal injuries may be tolled until the last day the employee was subjected to the conditions causing the injury. *Simmons v. American Mutual Liability Ins. Co.,* 433 F. Supp. 747, 751 (S. D. Ala. 1976), *aff'd without opinion,* 560 F. 2d 1022 (1977).

At least one court has applied these principles to a FELA claim for an injury which was not an occupational disease. In *Fowkes v. Pennsylvania R. R.,* 264 F. 2d 397 (3d Cir. 1959), the plaintiff's use of a defective air hammer had the cumulative effect of causing joint damage and arthritis. That harmful working condition was treated as a continuing or frequently repeated wrong which tolled the running of the statute of limitations. The court refused to limit the claim to aggravation of the injury that had occurred within three years of when suit was filed. Instead, it reasoned that the master's failure to perform its

duty was a single wrong, so that the statute did not begin to run on the injury until the master-servant relationship ended. *Id.* at 399.

Fletcher filed this lawsuit on June 8, 1977. The FELA has a three-year statute of limitations. If Fletcher is to recover for negligent assignment, the statute must have been tolled until June 8, 1974. *Fowkes v. Pennsylvania R. R.* stated the rule that the statute does not begin to run on the injury until the master-servant relationship ends. But we have been unable to locate a case with facts such as those at bar. In the typical case, regardless of when the tort was complete, the employee was still working under the harmful conditions within three years of filing suit; here Fletcher took leave-of-absence status more than three years before filing suit but never terminated the master-servant relationship. Although economic coercion is one rationale for tolling the statute as between master and servant, Fletcher's decision to forego compensation does not defeat his recovery. Rather, the salient factor is how long the Railroad persisted in its allegedly tortious conduct. There is sufficient evidence to convince us that, even after a physician had recommended otherwise and while Fletcher continued to seek a different assignment, the Railroad repeated its assignment of Fletcher as a sectionhand. In June of 1974, the Railroad sent Fletcher to a doctor to be evaluated for disability. The report, which was completed in July of 1974, found that Fletcher could be returned to work as a sectionhand. This fact alone brings Fletcher's filing within the statutory period. A further indication that Fletcher was still officially assigned as a sectionhand is that, on April 16, 1975, Dr. Kratochvil had to write to the Railroad, "I will not be able to release

him to return to his *present* job as a sectionman." The Railroad's allegedly tortious conduct did not cease until it assigned Fletcher to lighter work. Therefore, the statute was tolled sometime after April 16, 1975. Fletcher's June 8, 1977, filing was timely as to the negligent assignment claim.

The next question which arises is whether the assignment caused his present condition. The test of causation under the FELA is whether the railroad's negligence played any part, however small, in the injury which is the subject of the suit. *Dunn v. Conemaugh & Black Lick R. R.*, 267 F. 2d 571, 575 (3d Cir. 1959), *aff'g* 162 F. Supp. 324 (W. D. Pa. 1958); *Isgett v. Seaboard Coastline R. R.*, 332 F. Supp. 1127, 1143 (D. S. C. 1971). An employee's claim under the FELA does not depend on showing that the injury was caused by a particular negligent act, *Massimiani v. Monongahela Ry.*, 339 F. Supp. 832, 833 (W. D. Pa. 1972), but may be caused by the cumulative effect of a series of incidents, *Fowkes v. Pennsylvania R. R., supra*, 264 F. 2d at 399, or due to the employee's weakened condition, *Dunn v. Conemaugh & Black Lick R. R., supra*, 162 F. Supp. at 330. Recovery for the resulting injury may be had under the FELA. *Dunn v. Conemaugh & Black Lick R. R., supra*, 267 F. 2d 571; *Nuttall v. Reading Co.*, 235 F. 2d 546 (3d Cir. 1956).

All the evidence was consistent that Fletcher's back condition improved in response to rest and symptomatic treatment but flared up each time he was returned to work as a sectionhand. As Dr. Kratochvil succinctly put it in his letter to the Railroad claims agent, "The lumbar strain was the result of years of hard work." It is clear that the

Railroad's returning Fletcher to work as a sectionhand played a part in causing his present condition.

The remaining issue is whether the Railroad's repeated assignment of Fletcher as a sectionhand was in fact negligent. A railroad has a duty to assign employees to work for which they are reasonably suited. A railroad breaches that duty if it negligently assigns an employee to perform work beyond his capacity. *Massimiani v. Monongahela Ry., supra,* 339 F. Supp. at 833; *Bascho v. Pennsylvania R. R.,* 3 N. J. Super. 86, 65 A. 2d 613, 616 (1947). The railroad is negligent if it knew or should have known that its assignment exposed the employee to an unreasonable risk of harm. *Dunn v. Conemaugh & Black Lick R. R.,* 267 F. 2d 571, 576 (3d Cir. 1959), *aff'g* 162 F. Supp. 324 (W. D. Pa. 1968); *Gulf Colorado & Santa Fe Ry. v. Waterhouse,* 223 S. W. 2d 654, 659 (Tex. Civ. App. 1949). Whether the assignment was negligent is a question of fact. *Dunn v. Conemaugh & Black Lick R. R., supra,* 162 F. Supp. at 327. Generally, a railroad has no duty to ascertain whether an employee is physically fit for his job, but if it undertakes to give physical examinations, it is liable if it performs such undertaking negligently.[9] *Isgett v. Seaboard Coastline R. R., supra,* 332 F. Supp. at 1141; *McGuigan v. Southern Pacific Co.,* 129 Cal. App. 2d 482, 277 P. 2d 444, 452 (1954). Where a physician certifies the employee as fit to return to heavy labor, it is not the employee's burden

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9 This result is not harsh when one considers, first, that this doctor is almost certainly an agent of the employer and, second, that the employer undoubtedly has a hand in setting the standards for disability and employment physicals.

to show malpractice by the examining physician,[10] rather it is sufficient to show that the railroad knew or should have known that the employee was unfit for the work because of his condition. *Dunn v. Conemaugh & Black Lick R. R., supra,* 267 F. 2d at 576; *Mroz v. Dravo Corp.,* 293 F. Supp. 499, 504 (W. D. Pa. 1968) (fit-for-duty slip from hospital was not conclusive of plaintiff's fitness to work). The employee's knowledge of his physical condition does not absolve the railroad of its duty to protect the employee from further injury. *Massimiani v. Monongahela Ry., supra,* 339 F. Supp. at 833; *Mroz v. Dravo Corp., supra,* 293 F. Supp. at 504 (3d Cir. 1956) (employee called in sick but was refused permission). *But cf. McGuigan v. Southern Pacific Co., supra,* 277 P. 2d at 454 (railroad liable if it knew that employee was ignorant of his condition); *George v. Hillman Transportation Co.,* 340 F. Supp. 296, 301 (W. D. Pa. 1972) (claim barred when employee aware of condition but didn't give notice to employer).

The district court did not reach the negligent assignment claim. It has not yet had an opportunity to apply the law on negligent assignment to the facts before us. Neither have the parties briefed the point. Because of our findings that Fletcher's filing was timely as to the negligent assignment claim and that Fletcher's assignment played a part in his current condition, we reverse in part

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10 Most such cases find that the examining physician was an agent of the railroad. *E. g., Dunn v. Conemaugh & Black Lick R. R., supra,* 162 F. Supp. 324; *McGuigan v. Southern Pacific Co., supra,* 277 P. 2d 444. However, such a finding is not essential.

and remand to the district court for proceedings consistent with this opinion.[11]

HENLEY, Circuit Judge, concurring in part, dissenting in part.

The result reached by the majority is acceptable except as it deals with the issue of negligent assignment.

Since the district court did not reach the negligent assignment claim and the parties did not brief the issue, it might have been preferable to have remanded that entire issue for initial findings and conclusions by the district court. However, a majority of this panel has found that there was an assignment to heavy labor continuing beyond June 8, 1974, the critical date for limitations purposes, and has remanded for determination of the question whether that assignment was negligent and, if so, for determination of the amount of damages. I accept the majority's finding of fact.

It seems to be conceded by all that appellant took leave of absence from heavy work as a sectionhand on December 7, 1973. Thus, we have a final date of injury no later than December 7, 1973 but perhaps a continuing technical assignment as a sectionhand after June 8, 1974.

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11 If the district court finds that the Railroad's repeated assignment of Fletcher to heavy labor became negligent at some point, then it will necessarily determine the damages award. Damages for negligent assignment may include loss of wages, actual and prospective medical expenses, pain and suffering, and loss of future earning capacity. *Isgett v. Seaboard Coastline R. R., supra,* 332 F. Supp. at 1142-43; *Brown v. Pennsylvania R. R.,* 179 F. Supp. 858 (W. D. Pa.), *aff'd,* 282 F. 2d 522 (3d Cir. 1960).

In such circumstances the holding of the majority that there is a timely claim or tolling of the statute of limitations is troubling indeed.

It is elemental that for a statute of limitations to begin to run on a negligent act, some injury or damage must occur which will entitle the victim to maintain the cause of action. *Continental Grain Co. v. Fegles Const. Co.*, 480 F. 2d 793, 797 (8th Cir. 1973) (Minn. law). By extension it seems to follow that occurrence of a mere negligent act without injury cannot constitute a continuing tort sufficient to toll the statute of limitations. *Garelick v. Goerlich's, Inc.*, 323 F. 2d 854, 856 (6th Cir. 1963). *See also Fitzgerald v. Seamans*, 553 F. 2d 220, 230 (D. C. Cir. 1977).

It is one thing to say that a continuing or repetitive injury within the statutory period may bring forward earlier injuries or aggravations, *Donaldson v. O'Connor*, 493 F. 2d 507, 529 (5th Cir. 1974), *vacated on other grounds*, 422 U. S. 563, *on remand*, 519 F. 2d 59 (1975); *Fowkes v. Pennsylvania R. R.*, 264 F. 2d 397, 399 (3d Cir. 1959); it is quite another to say that a continuing tort extending into the statutory period but unaccompanied by injury within that period will bring forward pre-period injuries. Since I am not prepared to go that far, I respectfully dissent from so much of the opinion and result reached by the majority as would reverse or remand in part.

A true copy.

ATTEST:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIV. 77-0-178

DONALD D. FLETCHER,
Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,
a corporation,
Defendant.

MEMORANDUM OPINION
(Filed March 15, 1979)

This action was commenced, and the jurisdiction of this Court properly invoked, under the provisions of the Federal Employers' Liability Act (FELA), 45 U. S. C. § 51, *et seq.* Plaintiff Donald Fletcher, an employee of the defendant Union Pacific Railroad Company (U. P.), alleges that he sustained a compensable work-related back injury in 1962 while shoveling crushed rock in the course of repairing a section of railroad track in Omaha, Nebraska. Plaintiff further alleges that the condition of his back steadily worsened over the ensuing years until finally, in July, 1974, he underwent surgery and a spinal fusion was performed. This suit was thereafter filed in June of 1977.

The case was tried to this Court sitting without a jury. At the close of the plaintiff's case, U. P. moved to dismiss, claiming that the action was time-barred under FELA's three-year statutory limitation period. The defendant did

not thereafter present any evidence and the cause was thus submitted. For the reasons stated herein, the Court will enter a separate order granting defendant's motion to dismiss.

Damage actions under FELA must be commenced "within three years from the day the cause of action accrued." 45 U. S. C. § 56. It is well settled that where the source of injury is traumatic, the plaintiff's cause of action accrues under this section on the day the injury is sustained even though the full extent or seriousness of the injury is not ascertained until a later date. *DeHerrera v. Union Pacific Railroad,* No. 78-1563, Slip Op. at 5-6 (10th Cir. Dec. 14, 1978); *Holifield v. Cities Service Tanker Corp.,* 421 F. Supp. 131, 134 (E. D. La. 1976), *aff'd* 552 F. 2d 367 (5th Cir. 1977); *Felix v. Burlington Northern, Inc.,* 355 F. Supp. 1107, 1109 (D. Minn. 1973); *Deer v. New York Cent. R. Co.,* 202 F. 2d 625 (7th Cir., 1953).[1] Such is the case here. Mr. Fletcher testified that as he was finishing his shoveling activity something in his back suddenly "popped," causing instant and severe pain. He was at that moment fully aware of the fact of injury. The Court thus concludes that plaintiff's cause of action accrued on March 21, 1962, the date his injury was sustained. This, of course, is some fifteen years before suit was brought.

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1 A distinction is drawn in FELA cases between traumatic injuries and industrial diseases. An exception to the usual accrual date is recognized where the nature of the injurious event is such that its symptomatic impacts are not immediately manifest. *See Urie v. Thompson,* 337 U. S. 163, 169-70 (1949) (silicosis contracted through long-term inhalation of silica dust); *Young v. Clinchfield Railroad Co.,* 288 F. 2d 499, 502-03 (4th Cir. 1961) (same).

For practical purposes, the plaintiff does not dispute the above conclusion and has shown the Court no authority supporting an argument that a different accrual standard is applicable to FELA cases than is generally applicable to other tort actions for personal injuries. Instead, the assertion is made that the defendant is equitably estopped from invoking the statute of limitations as a bar to this action and this is the issue before this Court.

In this connection, it is well established that an employer may not avail himself of the statute of limitations if his own wrong, or that of his agent, has prevented the plaintiff from filing his claim within the limitations period. For instance, if the employer, or a physician acting on behalf of the employer, misrepresents to the employee the true nature and extent of his injury and thereby induces the employee to forego his cause of action, the employer may not thereafter rely on the statute as a defense to the employee's untimely claim. Moreover, the misrepresentation need not be intentional or fraudulent, so long as it is relied upon in good faith by the employee and in fact misleads him in respect to his awareness that a cause of action exists. *Holifield v. Cities Service Tanker Corp., supra,* 421 F. Supp. at 135; *Mumpower v. Southern Railway Co.,* 270 F. Supp. 318, 319 (W. D. Va. 1967). In support of his contention that U. P. is thereby estopped from relying on the statute of limitations in this case, plaintiff relies on the following course of events.

The evidence shows and the Court finds that immediately after he injured his back, Fletcher was taken to the Union Pacific Railroad Employees' Hospital Association dispensary (UPREHA). The UPREHA is an association

of U. P. employees which provides a variety of medical services for its employee members. Though the staff, management and control of the UPREHA are wholly independent of U. P. management, a medical dispensary is operated on U. P. premises. Fletcher was treated at this dispensary and released the same day. Because of pain associated with his injury, Fletcher was unable to return to his normal work duties for approximately two months. During the next several years, Fletcher's back gave him occasional, and sometimes serious, difficulty in performing his duties as a section hand, which duties include a substantial amount of heavy labor.

In February of 1966, responding to complaints of back pain, Fletcher was referred by the UPREHA to the office of Gross, Iwersen, Kratochvil and Klein, orthopedic surgeons. This office has treated Fletcher since that time. Plaintiff's hospital records, which were introduced in evidence, reflect that between February of 1966 and July of 1973, Fletcher was admitted to the hospital on at least five different occasions, each time complaining of back pain. Tests were administered and diagnoses rendered. At various times during this period, Fletcher was diagnosed, at least tentatively, as suffering from chronic back sprain, lumbar disc syndrome, sciatic neuritis, dorsal lumbar arthritis, and functional psychoneurosis. Treatment for his condition included medication, exercise programs, and traction therapy, both in the hospital and on an out-patient basis. These treatments met with varying degrees of success, but each time Fletcher's return to work resulted ultimately in a recurrence of pain. Fletcher also sought the help of chiropractors and others. He gave up working in December of 1973 and took a leave of absence because he

felt he was unable to continue. Finally, in July of 1974, under the care of Doctor Bernard Kratochvil, Fletcher was diagnosed as having an unstable back and a spinal fusion was performed.

Plaintiff claims that it was not until the spinal fusion was performed that a definitive medical basis could be discerned for his continuing back problems. The earlier "misdiagnoses" of plaintiff's condition, it is argued, served to conceal from Fletcher the true extent and precise nature of his injuries and misled him into a belief that no reason existed which would prevent him from continuing his job as a section hand. Finally, plaintiff contends that because of these misdiagnoses U. P. should not now be allowed to rely on the statute of limitations to bar Fletcher's claim.

The Court has serious doubts that the doctrine of equitable estoppel has any application whatever to the facts of this case. As noted above, an estoppel is made out only when the plaintiff has demonstrated that (1) the employer or his agent (2) misinformed the plaintiff, and (3) thereby misled the plaintiff in respect to his cause of action. In this case the doctors who treated Fletcher were not employees or agents of U. P., but members of an independent firm of physicians to which Fletcher was referred by the employees' hospital association. Moreover, on the evidence presented, this Court is unable to conclude that any of the various diagnoses of Fletcher's condition were medically inaccurate when made, though surgery was not indicated until 1974. Finally, and most importantly, Fletcher was not misled. He was well aware that he had a back injury which seriously impaired his ability to perform his job. Fletcher related this fact to his doctors and

sought their assistance in receiving less strenuous work duties. By deposition, Doctor Kratochvil testified to the following conversation between himself and Fletcher which transpired in July of 1973:

Dr. Kratochvil: Why don't you get a different job?

Fletcher: I was hired for this job, and this is the job I have the rest of my life.

Dr. Kratochvil: There must be something else you can do on the section besides this.

Fletcher: Yeah. There is a flagging job that I could do.

Dr. Kratochvil: What do you want me to write?

Fletcher: Just tell them that I can't do that heavy work.

By letter dated July 11, 1973, Doctor Kratochvil wrote to W. A. Ridge, superintendent of the Nebraska Division of U. P., stating: "Dear Mr. Ridge: Regarding Donald D. Fletcher. Because of his back condition, I recommend Mr. Donald Fletcher be given less strenuous work."

Following his consultation with Doctor Kratochvil, Fletcher returned to his job as a section hand and continued working until December 7, 1973, when, due to recurring back pain, he took an extended leave of absence. In February of 1974, Fletcher consulted Doctor Daniel McKinney, a neurologist. Doctor McKinney, noting Fletcher's 1962 injury and subsequent history, diagnosed Fletcher as "probably suffering from a chronic degenerative intervertebral disc or chronic lumbar strain."

Under the facts thus developed at trial, the Court must grant defendant's motion to dismiss. This is clearly not a case in which a company doctor tells an injured workman

that nothing is wrong, and then, years later, a slumbering symptom suddenly erupts and disables the plaintiff. On the contrary, Fletcher knew he was injured from the outset. He knew the injury impaired his ability to work. Fletcher's doctors confirmed that knowledge at least as early as July of 1973, and again in February of 1974, more than three years before this suit was filed. Under these circumstances, the Court can find no basis for holding that the provisions of the statute of limitations were tolled, or that U. P. should, in equity, be estopped from relying thereon. Accordingly, the Court will enter a separate order granting defendant's motion to dismiss.

By the Court:

/s/ Albert G. Schatz
Judge, United States District Court

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 79-1472, September Term, 1979

DONALD D. FLETCHER,
Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY,
a corporation,
Appellee.

(Filed May 7, 1980)

APPEAL FROM the United States District Court for the District of Nebraska.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the District of Nebraska and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed in part in accordance with the opinion of this Court.

It is further ordered by this Court that this cause be, and it is hereby, remanded to the said District Court for proceedings consistent with the majority opinion of this Court.

May 7, 1980

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIV. 77-0-178

DONALD D. FLETCHER,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Defendant.

(Filed March 15, 1979)

ORDER

In accordance with the memorandum opinion entered herein this date,

IT IS HEREBY ORDERED that defendant's motion to dismiss plaintiff's complaint should be and the same is hereby sustained, each party to pay its own costs.

By the Court:

/s/ Albert G. Schatz
Judge, United States District Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIV. 77-0-178

DONALD D. FLETCHER,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Defendant.

(Filed May 4, 1979)

ORDER

This matter coming on for hearing with reference to plaintiff's motion to alter judgment or in the alternative for a new trial (Filing No. 29), and the Court having examined and studied the briefs filed in support of and in opposition to said motion and having heard oral argument by counsel, and being fully advised in the premises,

IT IS HEREBY ORDERED that plaintiff's said motion be and the same is hereby overruled.

By the Court:

/s/ Albert G. Schatz
Judge, United States District Court

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1472, September Term, 1979

DONALD D. FLETCHER,

Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, ETC.,

Appellee.

Appeal from the United States District Court
for the District of Nebraska

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

Judges Bright, Ross and Henley would grant the petition for rehearing en banc.

June 26, 1980

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1472, September Term, 1979

DONALD D. FLETCHER,

Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Appellee.

Appeal from the United States District Court
for the District of Nebraska

On motion of appellee, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed to and including September 24, 1980. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

July 25, 1980

No. 80-446

In The

Supreme Court of the United States

October Term, 1980

UNION PACIFIC RAILROAD COMPANY,
A Corporation,
Petitioner,

vs.

DONALD D. FLETCHER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TEXT

53 Am. Jur. 2d, *Master and Servant,* section 357 4

No. 80-446

In The

Supreme Court of the United States

October Term, 1980

UNION PACIFIC RAILROAD COMPANY,
A Corporation,

Petitioner,

vs.

DONALD D. FLETCHER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT

Respondent Donald D. Fletcher respectfully requests that the petition of Union Pacific Railroad for a writ of certiorari to review the decision of the Eighth Circuit Court of Appeals be denied.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 621 F. 2d 902. The statement in petitioner's brief that the opinion by the Honorable A. G. Schatz, United States District Judge for the District of Nebraska was not reported is incorrect. The citation to the District Court's opinion is *Fletcher v. Union Pacific Railroad,* 467 F. Supp. 61 (1979 D. C. Neb.)

———o———

REASONS WHY THE WRIT SHOULD BE DENIED

The Court of Appeals for the Eighth Circuit was correct in its determination that respondent Fletcher's claim against his employer Union Pacific Railroad for work connected disability was timely filed, because the railroad's tortious conduct did not cease until Fletcher was assigned to lighter work. This case is directly in accord with the holding and opinion in Fowkes v. Pennsylvania RR Co., 264 F. 2d 397 (3rd Cir. 1959).

———o———

STATEMENT OF FACTS

The opinion by the Eighth Circuit Court of Appeals with regard to the statute of limitations issue was based on a holding that the railroad's assignment of Fletcher to work more strenuous than that for which he was reasonably suited was not barred by limitations, because the tortious

conduct did not cease until the employer assigned the employee to do lighter work.

The reassignment to lighter work was not made until April 16, 1975. In support of its position, the court cited the case of *Fowkes v. Pennsylvania Railroad Co.*, 264 F. 2d 397 (3rd Cir. 1959). This case is discussed in the petition for certiorari and we respectfully disagree with the petitioner's analysis of the Fowkes' case.

The Fowkes' case held that a railroad boilermaker's suit under the Federal Employers' Liability Act was timely where from 1924 until September 9, 1952 Fowkes used a large air hammer to cut stay bolts. Sometimes the accumulation of water in the airlines leading to the hammer caused the hammer to stop suddenly. The sudden stop in the hammer caused a severe jolting and Fowkes developed pain in his shoulders which was diagnosed as traumatic arthritis. Thereafter, Fowkes bid for lighter work which he did not receive until August 31, 1952 although his symptoms of pain and disability existed throughout the many years that he operated the air hammer.

In affirming a judgment against the railroad, the Court of Appeals for the Third Circuit rejected the railroad's arguments that:

> "1. The cause of action necessarily accrued during the extended period *before* August 31, 1952, where the boilermaker was suffering damaging jolts and experiencing pain therefrom.
>
> "2. The action was timely only as to the aggravation of his condition between August 31, 1952 and September 9, 1952 when the injurious work was terminated."

The court said that since the boilermaker never suffered a single serious injury, the statute of limitations did not begin to run until the boilermaker was relieved of work with the heavy hammer on September 10, 1952.

The record in this case is clear that Fletcher was not released from section hand work until April 16, 1975.

In 53 Am. Jur. 2d, *Master and Servant,* section 357, the authors state:

> ". . . other authorities hold that the statute of limitations begins to run from the time of the employer's negligence in exposing the employee to the disease which injures him, or that the statute runs from some other period, *such as from the time of the cessation of the wrong, negligence, or overt acts complained of, or from the time of the termination of employment.*" (Emphasis supplied.)

In *Burnett v. New York Central Railway,* 380 U. S. 424, 13 L. Ed. 2d 941, 85 S. Ct. 1050 (1965), the Court stated that "The 'basic inquiry' in determining whether the limitation period of sec. 6 is tolled, it said, is whether the congressional purpose is effectuated by tolling the period in given circumstances." The Court concluded that the limitation period is tolled whenever "it effectuates the basic congressional purposes in enacting this humane and remedial (Federal Employers' Liability) Act."

The railroad's petition for certiorari gives the impression that Fletcher was relieved of section work duties on December 7, 1973 by voluntary intervention, which the railroad initiated. This is completely false and in fact, Fletcher's employment status and requests for reassignment to lighter work were rejected. In addition, the railroad challenged his contention that he could not continue

section work by rejecting his application for disability retirement. This occurred in June and July of 1974, the same month that surgery was performed to fuse the fourth and fifth lumbar vertebrae to stabilize his spine.

There is ample evidence in the record of this case to support the ruling by the Eighth Circuit Court of Appeals that Fletcher was assigned on a continuing basis to perform services that were beyond his physical capacities and limitations. The sufficiency of evidence on this issue is not questioned in the defendant railroad's petition for certiorari.

The record in this case contains ample evidence concerning the treatment, medical records and testimony of Dr. Bernard Kratochvil that plaintiff's back problem, pain and disability were brought on by being required on a continuing basis to perform work as a section hand which was beyond his physical capacities. Fletcher's back was seriously debilitated by years of stress and overwork. He had been under treatment for more than a decade for the pain, discomfort and ongoing disability to his back.

Dr. Kratochvil stated in correspondence in February of 1974 (Ex. 25), concerning the medical basis for Fletcher's pain and disability:

> "This is probably brought on by years of heavy work, but I am not aware of any particular accident in this area."

In the petition for certiorari there is no reference to the following facts and sequence of events.

Fletcher was hospitalized on two occasions in April and June 1973 for his chronic back pain and disability.

Fletcher was referred by Dr. Kratochvil in June 1973 to Dr. William Egan, a psychiatrist, for evaluation of his "mental depression". Dr. Egan stated the following on the hospital chart in April of 1973 (Ex. 34):

> ". . . The patient had considerable pain about two or three weeks ago, had a thought of suicide but not actually any intent. He denies any suicidal thought or intent at the present time. He states that he made this comment because he was having so much pain that day. He states that his wife feels that he has a change of personality but states both he and his wife feel it is secondary to the pain. Patient denies ever having an emotional problem. He feels he is basically a good provider when he is pain free. *He is worried about the future because of his back and not knowing how this will affect his work condition.*" (Emphasis supplied.)

In June 1973 when Fletcher was released from the hospital Dr. Kratochvil wrote to the plaintiff's superintendent the following:

> "Because of his back condition I recommend Donald Fletcher be given less strenuous work."

This recommendation was ignored and Fletcher was returned to his work as a section hand. Despite the request for lighter work, Fletcher was required to perform services which in the opinion of his treating orthopedic physician was beyond his physical capacities.

Once again Fletcher was reassigned to perform heavy labor services without any restrictions on weight lifting or physical activities. In December 1973 Fletcher went on a leave of absence status, because he was physically exhausted and unable to continue as a section worker. The argument is made in the petition for certiorari that the

last possible date of injury and the last possible date of alleged tortious acts by the railroad is December 7, 1973. The railroad then argues that Union Pacific should have fired Fletcher rather than grant him a leave of absence, because the employer-employee relationship would have terminated any further right to make a claim. This statement is erroneous and had it been within the power of the Union Pacific Railroad to validly terminate Fletcher's employment, this step surely would have been taken. Fletcher's leave of absence in December 1973 involved the exercise of a right he obtained through his years of service on the railroad, and his rights under his collective bargaining agreement. It certainly was not achieved through altruism on the part of his employer.

The fact is that employees are entitled to sick leave or leave of absence status when their physical condition prevents further participation in their employment. Fletcher was still under treatment by Dr. Kratochvil, was still in pain and was exercising the right to utilize his sick leave. There is no question that if Fletcher was unable to provide medical verification of his ongoing physical problems and disability, the railroad would have served notice on Fletcher that his employment was terminated.

This could not be validly done because he was still under active medical treatment. In February 1974 Fletcher was referred by Dr. Earl Connolly, one of the chief physicians for the Union Pacific Hospital Employees' Association, to Dr. Daniel McKinney for a neurological consultation. Fletcher had not been examined or treated by Dr. Daniel McKinney at any time prior to February 1974. The referral order for this examination

is part of the record in the case and it is noted that Fletcher had been evaluated for mental depression in connection with his back problems. The defendant railroad was still actively involved in making a determination as to Fletcher's employment status and his disability.

Dr. McKinney's report was received in evidence, to-wit Exhibit 7, and stated in part as follows:

> "The patient is probably suffering from a chronic degenerative lumbar intervertebral disc or chronic lumbar strain."

Dr. McKinney's report noted that "this man injured his back in 1962 while scooping rock during his job as a section hand on the railroad."

Additional disability evaluations were performed in June and July 1974 with the conclusion that Fletcher was not disabled and could return to section work.

In June 1974 Fletcher requested that he be placed on a disability status because of his chronic back injury. It was noted in the opinion by Judge McMillian, reported 621 F. 2d 902. On page 905 of the opinion the court stated:

> "In June 1974, the Railroad sent Fletcher to be evaluated for disability. Based solely on X-Rays, these doctors decided that Fletcher was physically sound and rejected him for disability or retirement. Their report was made in early July 1974.
>
> "Coincidentally, in July 1974, Dr. Kratochvil told Fletcher he needed a fusion operation for his 'unstable back'. Dr. Kratochvil testified that Fletcher's pain was precipitated by movement and that the purpose of the fusion operation was to decrease movement in the back and thus decrease the pain."

From these statements it is clear that the railroad still classified Fletcher as a section hand and would have returned him to section work if it were possible to do so.

The Union Pacific doctors concluded on the basis of X-rays that Fletcher was not entitled to a disability classification. Dr. Kratochvil, a Board Certified Orthopedic Surgeon, decided to perform surgery on Fletcher's back in July 1974 which was at the same time that the railroad determined that he was not disabled and not eligible for a disability classification.

Moreover, Dr. Kratochvil testified that the purpose of the surgery performed in July 1974 was to stabilize the low back area. In the surgery which was conducted by Dr. Kratochvil, the fourth and fifth lumbar vertebrae are fused to the sacrum, by means of a transverse process fusion in which a section of bone is removed from the hip and fused to the body of the vertebra (Ex. 34, 62:10-16). The purpose of the operation was to stabilize the back and eliminate the pain.

If the surgery would have been successful, Fletcher presumably would have been reassigned to maintenance of way or section hand activities. It certainly would not be unreasonable for the employee-patient to rely upon the doctor that the surgery being performed would accomplish the objectives that were intended. If the operation worked, Fletcher's back would be "stabilized and free of chronic pain". Fletcher would have no basis for a claim and no valid reason to refuse to return to his employment.

It is respectfully submitted that this point is ignored or glossed over by the petition for certiorari filed herein.

If an employee is still under treatment and being considered for corrective surgery that is intended to solve his medical problems, the statute of limitations surely remains open until the determination can be made on the medical prognosis for the patient.

It is clear also that Dr. Kratochvil viewed Fletcher's employment status in this light since he wrote to the roadmaster for the defendant railroad on April 16, 1975 that:

> "I will not be able to return him to his *present job as a section man.* We would like to get him back to work as soon as another type of work is available." (Emphasis supplied.)

In addition, Dr. Kratochvil wrote another letter on July 23, 1975 stating that:

> "He is being released today for temporary work as a crossing watchman."

In summary, the plaintiff's complaint was filed on June 8, 1977. This was within the three-year statute of limitations and within the time period that the railroad refused to accept Fletcher as a disabled employee. If Dr. Kratochvil had not performed surgery to "stabilize his back" in July 1974 and then kept Fletcher off duty until July 1975, the railroad would have ordered him back to section work. Certainly Fletcher was entitled to find out whether or not the surgery would correct his back problems by stabilizing his back and relieving the pain.

CONCLUSION

For the reasons stated, it is respectfully submitted that the opinion and judgment entered herein by the Eighth Circuit Court of Appeals was and is correct. There exists no valid reason for this Honorable Court to grant the petition for a writ of certiorari.

In the event this Court is inclined to review the questions presented herein, there should be an opportunity for both sides to submit complete briefs, and the case should be assigned for oral argument.

Respectfully submitted,

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